EQUITICORP HOLDINGS LTD

v.

PLASTICOOL (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[WINDING UP PETITION NO: D8-28-560-2005]
31 JANUARY 2007

COMPANY LAW: *Winding up - Section 218(1)(e) of the Companies Act 1965 - Company deemed unable to pay its debt - Onus on company at hearing of petition to prove that it is not commercially insolvent or to dispute the debt - Winding-up petition to be dismissed where alleged debt is disputed in good faith and on substantial grounds - Winding-up petition is not legitimate means to enforce payment of a disputed debt*

COMPANY LAW: *Winding up - Hearing of petition - Function of court - Court not to adjudicate on merit of debt - Court only to determine whether company is unable to pay its debt*

This was a petition to wind up the respondent pursuant to s. 218(1)(e) of the Companies Act 1965 on account of the respondent being unable to pay its debt. A statutory notice under s. 218(1)(e) had been issued to the respondent and the respondent had failed to comply with the notice. The respondent claimed that the affidavit was made by the solicitor representing the petitioner and that he had no knowledge of the alleged debt and was not competent to make the affidavit. The respondent contended that the person who was competent to make the affidavit in respect of the respondent's debt would be the director or a principal officer of respondent company. As such, since there was no verifying affidavit to support the application, the respondent prayed for the petition to be dismissed. The respondent also disputed the debt, exhibiting various correspondence as evidence. There was an alleged assignment from the Official Assignor Singapore to the petitioner. The debt was disputed as the assignment was said to be a sham.

Held (dismissing the petition with costs):

(1) Under s. 218(1)(e) of the Companies Act 1965, a company which fails to satisfy the petitioner's statutory notice is deemed unable to pay its debt, the effect of which is to place on it the onus of satisfying the court at the hearing of the petition that it is not commercially insolvent that is to say it is able to pay its debtor every sen to the ringgit. (para 8)

(2) A statutory notice issued under s. 218(1)(e) of the Act merely assumes that the company had owed the petitioner the sum demanded in the notice without so much as to require the petitioner having first to prove the debt. It is therefore open to the company to dispute the alleged debt at the hearing of the petition and where the court is satisfied that the company in good faith and on substantial ground disputes the alleged debt, the petition ought to be dismissed on the ground that the winding-up petition is not legitimate means to enforce the payment of a disputed debt. (para 9)

(3) It is not the function of the court hearing a petition to wind up the company to adjudicate on the merit whether the company owes the petitioner a debt. Its function is to hear the petitioner only to determine whether the company is unable to pay its debt. (para 12)

Case(s) referred to:

Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd [1980] 1 LNS 44 PC ***(refd)***

Metal Reclamation (Industries) Sdn Bhd v. JRC Tenaga Sdn Bhd [2000] 6 CLJ 290 HC ***(refd)***

Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors [1985] 1 CLJ 181; [1985] CLJ (Rep) 575 HC ***(refd)***

In Re Fortune Copper Mining Company [1870] LR 10 Eq 390 ***(refd)***

Re Nima Travel Sdn Bhd Sun Soon Heng Coach Works Sdn Bhd v. Nima Travel Sdn Bhd [1984] 1 LNS 162 HC ***(refd)***

Wee Kah Lee v. Silverdale Investment Pte Ltd [2000] 4 SLR 429 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218(1)(e)
Legal Profession Act 1976, r. 28
Rules of the High Court 1980, O. 41 r. 5

For the petitioner - K Shanti Mogan (SY Liew with her); M/s Shearn Delamore & Co

For the respondent - S Tilagavathai; M/s Megat Najmuddin Leong & Co

Reported by Amutha Suppayah

JUDGMENT

Kang Hwee Gee J:

[1] This is a petition to wind up the respondent pursuant to s. 218(1)(e) of the Companies Act 1965 on account of the respondent being unable to pay its debt.

[2] A statutory notice under s. 218(1)(e) had been issued to the respondent as follows: A

Notice

Pursuant To Section 218 Of The Companies Act 1965

B

To: Plasticool (M) Sdn Bhd (Company no. 104264-T)
(Registered Office)
19 Jalan Thamby Abdullah Satu (1)
Brickfields
50470 Kuala Lumpur

C

Plasticool (M) Sdn Bhd (Company no. 104264-T)
(Business address)
41 Jalan Ulu Kelang
68000 Ampang
Selangor Darul Ehsan.

D

Re: Notice Pursuant To Section 218 Of The Companies Act 1965 Plasticool (M) Sdn Bhd indebtedness of RM8,964.00 to Equiticorp Holdings Ltd (in Statutory Management)

1. Take Notice that:

E

(a) You are and was at all material times indebted to Cheah Theam Swee (NRIC 1725256) for the sum of RM8,964.00 (Ringgit Eight Thousand Nine Hundred and Sixty Four) ("the Debt").

(b) *Vide* order of the High Court of the Republic of Singapore dated November 9th 1998, Cheah Theam Swee was adjudicated a bankrupt whereupon all his assets, including but not limited to the Debt, vests in the hands of the Official Assignee, Republic of Singapore.

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(c) Pursuant to a Deed of Assignment dated February 4th 2005 ("the Assignment") the Official Assignee, Republic of Singapore of the estate in bankruptcy of Cheah Theam Swee, as beneficial owner of the Debt, had assigned absolutely all of its present and future rights, title and interest in and under the Debt owing by you to Cheah Theam Swee of RM8,964.00 to Equiticorp Holdings Ltd (in Statutory Management) of Level 2, KPMG Centre, 18 Viaduct Harbour Avenue, Auckland, New Zealand with immediate effect.

G

H

2. Take Further Notice that:

I

(a) You are required to pay to us as solicitors for Equiticorp Holdings Ltd (in Statutory Management) the said sum of RM8,964.00 due and owing to Equiticorp Holdings Ltd (in

Statutory Management) or to secure or compound it to the reasonable satisfaction of Equiticorp Ltd (in Statutory Management) Within Twenty-one (21) DAYS upon service of this notice at your Registered Office abovementioned, Failing Which:

(b) You shall be deemed to be unable to pay your debts and appropriate action will be taken without further notice for the winding-up of Plasticool (M) Sdn Bhd (Company no. 104264-T).

Dated Friday, February 25th 2005.

[ref: 2659522-mi] Signed

....

Shearn Delamore & Co.
Solicitors for Equiticorp Holdings Ltd (in Statutory Management).

T52451-622.025

[3] The respondent had failed to comply with the notice. Hence this petition.

[4] The petition is opposed by the respondent on the following grounds:

1. There were three previous interlocutory applications:

   i) By the respondent for security for costs which was granted by the court sometime in August 2006.

   ii) By the petitioner for extension of time to file in the 2nd affidavit verifying petition.

   iii) By the petitioner for notice to produce documents.

   Both applications (ii) and (iii) were dismissed with costs.

   This would mean that the petitioner can only rely on the 1st affidavit to verify this petition.

   Submits: This affidavit was made by the solicitor who is representing the petitioner. He has no knowledge of the alleged debt and he was not competent to make the affidavit. The person who is competent to make the affidavit in respect of the respondent's debt would be the director or a principal officer of respondent company. See

O. 41 r. 5 of the Rules of the High Court 1980. The solicitor made the affidavit based on the power of attorney granted to him by the petitioner. He has no actual knowledge of the debt owed by the respondent.

2. The rule of the Legal Profession (Practice and Etiquette) Rules 1978 discourages solicitors from affirming affidavits for clients. See *Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon & Ors.* [1985] 1 CLJ 181; [1985] CLJ (Rep) 575.

3. Based on the affidavit verifying petition there is no verifying affidavit to support this application and therefore this petition should be dismissed.

4. We also dispute the debt. There is an alleged assignment from the Official Assignor Singapore to the petitioner. The assignment was done on 4 February 2005. In the letter from the OA Singapore (encl. 25 exh. "YFK-2" p. 16) it is stated that the Official Assignee makes no warranty or representation as to the liberty of the title of the debt. This debt is disputed as the assignment is a sham. We have proof – see encl. 5 exh. "CTK-4" letter from OA Singapore to the shareholder asking him whether he had other persons who can make a better offer by 19 April 2004 to buy over the debt of the respondent. Later on 22 July 2004 OA Singapore wrote another letter to the petitioner saying that he had received an offer of 750 Singapore Dollars and requested the petitioner to up the offer. Thereafter there was no other correspondence. Eventually the debt of the respondent together with the debt of other companies to the shareholder was sold by assignment to the petitioner for miserly sum of 10,200 Singapore Dollars. The manner in which the transaction was conducted between OA Singapore and the petitioner was unfair to the shareholder (the bankrupt whose affairs he was managing). The OA has written to the shareholder seeking a statement of affairs with respect to the debt of the respondent company owed to the shareholder. The shareholder replied saying that he did not have any documents to substantiate the debt of the respondent to him. See letters exhs. "CTK-3D and 3E" of encl. 5.

[5] Reply By Counsel For The Petitioner

1. The debt is not disputed – refer encl. 17 exh. "BGS-2". This is an affidavit verifying statement of affairs filed by the shareholder bankrupt who is owed the debt by the company. This is filed in the Singapore High Court and declares amongst others all the debts due to him (the bankrupt shareholder). One of the debts listed in this statement is the debt we are now claiming (p. 23 of 50) stating the sum of RM8,964 which is the debt due in this case. Further

this debt is acknowledged in exh. "CTK-12" encl. 5 by the shareholder. The contents of this letter have been adopted by the respondent "for its full term and effect" in its affidavit in para. 25 of encl. 5.

2. The communication by letters (exhs. "CTK-3A, 3B, 3C, 3D and 3E" in encl. 5) between the bankrupt shareholder and the official assignee in relation to the purchase of the book debt of the respondent to the shareholder. The bankrupt shareholder had replied that he did not have documents to substantiate the debt but did not dispute the debt.

3. Further evidence that there is a debt from the respondent to the bankrupt shareholder can be seen in exhs. "CTK-5", "CTK-6", "CTK-7", "CTK-8", "CTK-9" and "CTK-10" which are essentially communciation to discuss the purchase of the debt between the official assignee and the shareholder.

4. Further evidence that there is a debt – see exh. "CTK-12" where it is stated the debts were advances where the bankrupt shareholder wrote to the official assignee to state the debts were advances made by him voluntarily. There were no provision for interest, no repayment terms and that the debt had not been repaid. The respondent in affidavit suggests that the fact that there were no repayment terms suggest there is no debt. This is not the case – see *Wee Kah Lee v. Silverdale Investment Pte Ltd* [2000] 4 SLR 429 at Held (2) p. 430.

> In ordinary circumstances, payment of money imports a *prima facie* obligation to repay the money in the absence of circumstances from which a presumption of advancement can or may arise. A loan, in the absence of any term governing the time for repayment, would be repayable on demand or at least repayable within a reasonable time of request for repayment. What was reasonable depended on all the circumstances surrounding the loan, including the relationship between the parties, the purpose and the size of the loan.

Submits: The respondent did not in their affidavit dispute that they received money from the bankrupt shareholder. It merely says that the debt is disputed implying that the money received is not a debt. The respondent supports this contention in the following manner:

(i) the debt cannot be substantiated by documents;

(ii) the debt is not recoverable;

(iii) there is no repayment term;

(iv) in any event the debt is barred by limitation.

5. None of the above establishes that there is no debt.

6. The limitation point is a misnomer by reason of the respondent's own averment that the debt has no repayment term. The law says such a debt is repayable on demand and limitation should start from the date of demand when we issue the 218 notice. In any event the debt has been acknowledged by both the shareholder and the respondent by their conduct in seeking to purchase the debt.

7. In preliminary point on competency of solicitors to swear affidavit for the client, see *In re Fortune Copper Mining Company* [1870] LR 10 Eq 390 per headnote:

> Where a winding-up Petition was presented under a power of attorney executed by Petitioners resident in a colony to a solicitor in this country, it being impossible to comply with Rule 4 of the Order of November, 1862, the Court made the order upon verification of the Petition by an affidavit of th solicitor, deposing of his knowledge to the facts stated in the Petition.
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> Where the registered place of business of a company had been demolished, service on directors at the present place of business, though not registered, was held sufficient.

8. Respondent's submission that the words used in the affidavit verifying petition 'based on my instruction' and 'I believed to be true' indicate that the solicitor affirming the affidavit had no knowledge of the debt and was incapable of affirming the affidavit is without merit. See r. 28 of the Legal Profession Act 1976 – submits does not apply as it does not prevent advocate and solicitor from swearing affidavit on formal or undisputed facts and further does not mention any prohibition in this fact of contentious affidavit. The affidavit affirmed by solicitor verifying petition is merely a formal affidavit and not a contentious affidavit filed thereafter by the petitioner itself.

9. On the issue of the assignment of the debt s. 218(2)(a) contemplates a creditor by assignment or otherwise.

10. The challenge mounted on the bidding process is not relevant to the petition save to establish the respondent appreciates the debt.

A **[6] Reply By Cik Tilaga**

1. Submits the case of *Metal Reclamation (Industries) Sdn Bhd v. JRC Tenaga Sdn Bhd* [2000] 6 CLJ 290 at Held (4):

> B A winding up petition is not a legitimate means of seeking to enforce a payment of debt which has not been clearly determined. Otherwise, the courts which hear winding up petitions would first have to establish the debt and this will put the courts to unnecessary strain if a petition to wind up is based not upon a judgment debt but purely on a s. 218(2)(a) notice.

C **[7] Reply By Cik Shanti**

1. Submits *Re Nima Travel Sdn Bhd Sun Soon Heng Coach Works Sdn. Bhd. v. Nima Travel Sdn Bhd* [1984] 1 LNS 162:

> D There is a plethora of authorities to the effect that a winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the company (see *Buckley*, *supra* at page 451 (a)).
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> E On the facts before me I am satisfied that there is a *bona fide* dispute as to whether there is a debt due from the respondent to the petitioner and also the quantum of such debt. The proper course of action for the plaintiff the moment they knew that their claim was disputed, was to establish their debt by filing an action to have the matter adjudicated upon in the usual way. If they were so convinced of the strength of their case, F they could have applied for summary judgement. These steps could have been taken in February or March 1984 and by now the position may well have crystallised.
>
> Whether or not a winding-up order is made is discretionary matter. Admittedly the defendant does appear to have some financial problems but this alone is not conclusive. The other G major creditor of the respondent is opposed to the winding-up and there is no evidence before me that the defendant is unable to pay the debt of the plaintiff.
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> The passage in Buckley appear to indicate that the old practice was for petitions founded on a disputed debt to be ordered to H stand over until the debt was established by action. The modern practice has been to dismiss such petition unless of course the debt is not disputed on some substantial grounds in which case the court could decide on the petition and make the order.
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> I The facts in this case indicate to my mind that there is a substantial dispute here which should have been apparent to the petitioner at the very least when they received the respondent's affidavit dated June 16, 1984.

The continuation of the winding-up proceedings after they had that knowledge, was not a permissible exercise of the process of this court.

Accordingly I would dismiss this petition.

Submits that petition will be struck out only if the respondent can satisfy the court that there is *bone fide* or substantial dispute.

Findings And Decision

[8] Under s. 218(1)(e) of the Companies Act 1965, a company who fails to satisfy the petitioner's statutory notice is deemed unable to pay its debt, the effect of which is to place on it the onus of satisfying the court at the hearing of the petition that it is not commercially insolvent that is to say it is able to pay its debtor every sen to the ringgit. See Singapore case of *Malayan Plant (Pte.) Ltd v. Moscow Narodny Bank Ltd* [1980] 1 LNS 44 approving the passage of Buckley at p. 460.

[9] But a statutory notice issued under s. 218(1)(e) of the Act merely assumes that the company had owed the petitioner the sum demanded in the notice without so much as to require the petitioner having first to prove the debt. It is therefore open to the company to dispute the alleged debt at the hearing of the petition and where the court is satisfied that the company in good faith and on substantial ground disputes the alleged debt the petition ought to be dismissed on the ground that the winding-up petition is not legitimate means to enforce the payment of a disputed debt. (See the two cases quoted by counsel.)

[10] Having heard the parties I am inclined to find that what the petitioner had purchased from the Official Assignee Singapore is not in substance 'a debt' but merely a right to a chose in action that is to say a right to sue the respondent for the debt that it allegedly owed to the bankrupt shareholder.

[11] The Official Assignee it must be appreciated is not an arbiter of disputes with respect to the debts due to the bankrupt. He steps into the shoes of the bankrupt merely to manage the affairs of the bankrupt and in going about to recover any monies due from persons who may owe the bankrupt, he is to be treated as if he is the bankrupt himself. He would have to go to this civil court to recover them.

[12] It follows therefore that the communications relied upon by the petitioner between the Official Assignee Singapore and the respondent with respect to the alleged debt cannot be accepted as conclusive evidence or acknowledgement that the respondent had owed the said sum to the bankrupt shareholder. At most they constitute evidence to

A be presented before the proper hearing in the civil court where the respondent should be able to challenge the claim. It is not the function of the court hearing a petition to wind-up the company to adjudicate on the merit whether the company owes the petitioner a debt. Its function is to hear the petitioner only to determine whether the company is B unable to pay its debt. If the company can show on substantial ground that the sum claimed by the petitioner is disputed, the following passage from the author of the *Corporate Powers Accountability* by Dato' Loh Siew Cheang 2nd Edition illustrates the point:

> 4. Disputed Debts
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> C
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> The legislative purpose of s. 218(1)(e) is to confer statutory jurisdiction upon the companies court to wind up insolvent companies. Its purpose is not to constitute the companies court as a forum to adjudicate upon substantial disputes with respect to debts. So, if a petitioner fails from the outset to show that there is no serious dispute D with respect to his status as a creditor, that a sum is indisputably owing and there is evidence of insolvency, the petition will be dismissed.
>
> The underlying reason for this proposition is that when there are serious disputes on these issues, it will be an abuse of process to use E the winding up provisions to forcibly collect doubtful debts. Recourse to winding up proceedings in such circumstances have the effect of bringing improper pressure upon a doubtful debtor to bear. The proper step to take is to file a writ action so that the disputes may be resolved in the ordinary way. In, *Stonegate Securities Ltd v. Gregory* [1980] 1 All ER 241, Buckley LJ said:
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> F
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> If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in the normal way. But if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed or, if the matter is G brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding up petition is not a legitimate means of seeking to enforce paymont of a debt which is *bona fide* disputed.
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> In *Re Nima Travel Sdn Bhd* [1986] 2 MLJ 374, there was undisputed H affidavit evidence with respect to the existence and quantum of an alleged debt. In striking out the petition, Shankar J (later, JCA) said:
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> > On the facts before me I am satisfied that there is a *bona fide* dispute as to whether there is a debt due from the respondent to the petitioner and also the quantum of such debt. The I proper course of action for the plaintiff the moment they knew

that their claim was disputed, was to establish their debt by filing an action to have the matter adjudicated upon in the usual way. If they were so convinced of the strength of their case, they could have applied for summary judgment.

What constitutes a 'substantial dispute' is a question of fact and degree. In the vast majority of cases, the evidence of whether there is a '*bona fide* dispute on substantial grounds' would have played itself out in correspondences between the parties just before a petition is filed.

[13] The petition is dismissed with costs.